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BUILDING RESTRICTIONS IN GENERAL PLAN—ENFORCEMENT —EQUITABLE DEFENCE—CHANGE IN CHARACTER AND CONDITION OF THE PROPERTY.—*Ewertsen et al.* v. *Gerstenberg et al.*, 57 N. E. 1051 (Ill.), 1900. At common law, upon a conveyance in fee, a covenant made *with* the owner of the land for his benefit, if it touched and concerned the land devised, would pass to his assignees. If, however, the covenant was made *by* the owner and restricted his use of the land, it would not pass to his assignees unless it created certain well-known easements. In equity, a class of exceptions to the latter part of the common-law rule was established. The exceptions were based on the doctrine that covenants or agreements "to use or abstain from using" bound the person, not the

land, and were enforceable against every subsequent purchaser who took with actual or constructive notice. Equity also took hold of a group of cases where the owner of a large tract, undertaking building improvements, laid it out in lots, and imposed on the purchasers restrictions in accordance with his plan. The vendor's intention once clearly established, the right to enforce the restrictions was given to the purchasers without regard to priority of title.

Suppose it is determined that the vendor has acted for the common benefit of the purchasers, and they have bought, induced by his intention, and have, therefore, strictly speaking, rights one against the other in regard to the restrictions, will equity enforce such agreements when the original plan has been abandoned, and the character, condition and uses of the property have greatly changed. This question is considered in the following case: Jerome Case, being the owner of a portion of outlot F, in the city of Chicago, divided it into lots, blocks and streets, and recorded a plan thereof, on which was marked a line called "Building Line," thirty feet within the street lines of said lots. Block 1 of outlot F was bounded on the north by Wrightwood avenue, and on the east by Orchard street. Lots 1 and 2, situated in the corner of Block 1, at the intersection of the aforesaid streets, were sold to the defendant, who bought with notice of the plan, but without an express clause of restriction in his deed. Lots 29 and 30, situated on Orchard street, south of defendant's lots, were sold to the complainants, their deeds containing a restrictive clause to the effect that a space of 30 feet from the street as marked in the plan should remain open. It is evident from the plan, and so the court viewed it, that the restrictions were imposed in order that the property might be better adapted for residence purposes. If the intention was to make it a business section the restrictions would have been practically without meaning. Now the lot owners in the vicinity of defendant and complainants did not keep their agreements. Those on the Wrightwood avenue side of Block 1 built business structures to the line of the street. Those immediately south of complainants encroached on the reserved space to within 25 to 19 feet from Orchard street, but did not put up other than dwelling-houses. There were other encroachments on lands in the vicinity subject to the same restriction. Complainants had acquiesced in the encroachments for some years. Defendant now began to construct an apartment house within 4 feet of the Orchard street line, and this breach the complainants sought to restrain by injunction. The defendant rested his case on two grounds: 1. His deed contained no express restriction. 2. Assuming this contention to be without weight, the great change in the character and uses of the property, acquiesced in by the complainants, would make the restriction a great hardship to him and of no benefit to them. The first point the court overruled, holding that an express clause in the deed was unnecessary because the defendant had constructive notice of the restriction from the plan, it being the common source of title. The second point, however, the court sustained, holding that the

appropriation of many of the lots to business purposes, taken together with the encroachments on lots adjoining the complainants, rendered the restrictions of little or no value to the property, but in fact a positive hindrance to its proper use. Also that complainants, by permitting the broken agreements, had put themselves in the actual position of those persons who had done the breaking, and naturally could not complain if a new breach was committed.

On the first point the decision expresses well-settled law. Indeed, the rule has been applied where no written covenants at all existed, but oral representations only that the plan would be carried out were made: *Tallmadge* v. *Bank*, 26 N. Y. 105 (1862).

The principle applied in this case in support of the second contention of the defendant can be traced to the leading case of *Duke of Bedford* v. *Trustees of British Museum*, 2 Mylne O. K. 552 (1822). It cites no authority for the position it takes. The soundness of the decision, however, it is too late to question. It is the basis of many English cases and the starting point of the doctrine as now developed in the United States. The Duke and the trustees agreed, upon a conveyance made by the former, that the property should be preserved for residence purposes. The feoffor, himself, then put up a number of buildings in the neighborhood. The purchasers starting to build on their lands, he sought to restrain them. But the court said that he had so altered the face of the property that it would be inequitable to enforce a contract which he really treated as void. It must either be enforced *in toto* or not at all. It is important to notice that the change in condition occurred through the acts of the grantor. There is, perhaps, stronger reason for refusing an injunction here than in a case where the hardship resulted from events beyond his control. In *Roper* v. *Williams*, T. & R. 18 (1822), Lord Eldon said, the vendor, when he takes a covenant from all the purchasers, acts for their common benefit and becomes a quasi trustee for them. If he seeks to enforce a covenant of this kind he must suffer no such breach as will frustrate the benefit that would otherwise accrue to the other parties to the agreement. Following this decision Vice-Chancellor Wood refused an injunction where there were covenants among the purchasers *inter se* and where the defendant purchaser bought with full knowledge of breaches committed before he took the deed. The basis of his decision is clearly stated. "The principal point is this: here is a common scheme, and it is one thing to say that parties may pursue any remedy they may be entitled to at law, and another thing to say that this court will grant specific performance of an arrangement which can only be carried out in part. A court of equity will say, the vendor cannot enforce these rules when he has suffered the whole of his original design to be broken up." *Peek* v. *Matthews*, L. R., 3 Eq. 515 (1867). See also *Sayers* v. *Collyer*, 24 Ch. D. 180 (1883), where the judge restricted his inquiry concerning the breaches to these covenants in respect to the block on which the alleged breach was committed, the covenants being expressly confined to that particular block.

In New York the rule has been extended to cover cases where a

contingency, not contemplated by the parties and beyond their control, has made the restriction unreasonable and oppressive. Where two adjoining landowners agree to use their lands for places of residence, and not allow any trade or business to be conducted thereon, and an elevated railroad is constructed along the street, the running of trains destroying privacy and quiet and rendering the premises unfit for dwelling purposes as originally intended, the agreements will not be enforceable: *Columbia College* v. *Thacher*, 87 N. Y. 311 (1883). An injunction was also refused where the defendant had erected a tenement house contrary to his agreement, and justified his action on the ground that nearby blocks had become a tenement district: *Amerman* v. *Deane*, 132 N. Y. 357 (1892). The same doctrine would very likely be applied in Massachusetts. It was substantially adopted in *Jackson* v. *Stevenson*, 156 Mass. 496 (1892). There is also a dictum by Judge Bigelow to the effect that if one or two owners seek to enforce a restriction against a number of other proprietors with similar rights and interests, as a result of which great financial loss will be inflicted on the latter, or a public improvement prevented, equity would very likely not grant an injunction: *Parker* v. *Nightingale*, 6 Allen, 349 (1863). In England, however, even to advance a public improvement, equity will not permit a breach of covenant: *Lloyd* v. *R. R. Co.*, 2 De G. J. & S. 568 (1865).

The Pennsylvania view is well illustrated by the case of *Landell* v. *Hamilton*, 175 Pa. 331 (1896). The covenant, here sought to be enforced in 1895, was made in 1832. It concerned property on Chestnut street, and the grantor bound himself and assigns forever to raise no structure higher than ten feet on land retained. What was then a residence neighborhood was now devoted to business purposes. The judge asked himself first whether the covenant ran with the land. The answer was: such is the intention of the parties, and it will therefore be enforced in equity, it being of no purpose to argue that such a restriction will retard the improvement of property. If the plaintiff still realizes a *substantial benefit* from its operation it is enforceable. But "equity would not interpose and retard improvements simply to sustain the literal observance of a condition or covenant." It is interesting to notice the attitude which this court, in the exercise of its equitable jurisdiction, takes toward such a covenant; first deciding whether it runs with the land, and then deciding whether it will bind an assignee with notice. See on this point *Tulk* v. *Moxhay*, 2 Phill. 774 (1848).

The cases reviewed show the general doctrine. It might further be asked whether any remedy is left to the complainants in the principal case. From the theory of the decision it follows that no remedy is necessary, because no injury is suffered from the breach. Where the vendor himself, however, has suffered certain vendees to break the covenants, and seeks to prevent others from so acting, equity says he must go to law and collect what damages he can. He sues on the covenants made with him. His legal remedy is clear, though he may have incurred no damage. But what legal

remedy have the complainants against the defendant. He has made no agreement with them. He has not even made an express agreement with the vendor for their benefit. And if he had made the latter, and the complainants would bring suit on the theory that they were third party beneficiaries of the contract, the rule ought not to be extended to give them such right: *Barrow* v. *Richards*, 8 Paige, 351 (1840). Finally, a vendor may show a clear intention to abandon a plan, by selling lots free from restrictions after he has sold other lots bound thereby. If the court is satisfied he has given up his original purpose, an injunction will be denied him, although there may be no evidence of a changed condition of the neighborhood. Such a change may occur as a result of the vendor's waiver and the court will then find its decree useless: *Duncan* v. *R. R. Co.*, 85 Ky. 525 (1887). A view more favorable to the vendor is taken in *Reilly* v. *Otto*, 66 N. W. 228, Mich. (1896). *F. K. S.*

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MARRIAGE DURING LIFE OF FIRST WIFE AND HER SUBSEQUENT DEATH.—*Barker* v. *Valentine*, 84 N. W. 297 (Mich.) 1900. This case does not involve a new point, but one on which there is some conflict of authority. A man marries a woman in New York in 1872. In 1884, while his wife is still living, he goes to Detroit and cohabits there with an unmarried woman, introducing her as his wife and claiming to be married to her; in the neighborhood they are reputed to be husband and wife. In 1889 the real wife in New York dies. The man still continues to live with the Detroit woman as her husband, and holds himself out to the world as such. Subsequently he dies and she seeks to recover on an insurance policy in which she is named as his wife, and, as such, beneficiary. The question whether or not they are legally married being in issue, the court holds that there is a presumption, from reputation and cohabitation subsequent to the removal of the only impediment to their lawful marriage; that they were in fact married.

The authorities which support the ruling of the court are numerous, the leading ones being *Campbell* v. *Campbell*, L. R., 1 H. L. Sc. 182; (1867) *De Thoren* v. *The Attorney-General*, L. R., 1 App. Cas. 686; (1876) *Blanchard* v. *Lambert*, 43 Iowa, 228; (1876) *Yates* v. *Houston*, 3 Tex. 433 (1848). See also *Bishop on Marriage and Divorce*, §§ 970, 975.

On the other hand, there are authorities which hold that, when a particular status exists, the law will presume its continuance, and when it is asserted that it has been changed, some evidence of that fact must be produced. Therefore, if the relationship between a man and woman is meretricious and illicit in its origin, the presumption will be (in the absence of any proof of a change of mind) that it continues such after the removal of any impediment which prevented a lawful marriage. This view is supported by *Lapsley* v. *Grierson*, 1 H. L. Cas. 498; (1848) *Cargile* v. *Wood*, 63 Mo. 501; (1876) *Barnum* v. *Barnum*, 42 Md. 251; (1875) *Cram* v. *Burnham*, 5 Me. 213 (1828).

The case of *Lapsley* v. *Grierson*, just cited, hints at what is per-

haps the true criterion in distinguishing these apparently irreconcilable views. Marriage is, after all, nothing more than an executed contract, and for a marriage to be valid there must have been an *intention*, freely exercised, on the part of both parties, to enter into the marriage relation. A marriage may sometimes be presumed from reputation and cohabitation, but these latter do not themselves constitute the marriage; they are simply rebuttable evidence that the parties intended to contract and did in fact contract a lawful marriage. Since, therefore, the question is one of intention, is not that intention to be found by inquiring whether the parties, when they began their illicit connection, *knew* of the existing impediment, or whether they *innocently* thought they were in fact assuming marital obligations? If the parties originally intended to contract marriage, would it not be reasonable to suppose that as soon as the impediment to that marriage was removed, their continuing to cohabit together was a cohabitation in the capacity of husband and wife? And, on the other hand, if the first connection was knowingly illicit, would it not be logical to infer that the parties, having shown their disregard of morality in the first instance, are not to be presumed to have legalized their status when the opportunity presented itself? It is no answer to say, as was said in *Yates* v. *Houston, supra*, that, "Admitting that their original intercourse was illicit with the knowledge of both parties, it would be urging the presumption to an unreasonable extent to suppose that the unlawful character of the connection was unsusceptible of change, and that when all legal disabilities had ceased to operate, they would voluntarily decline to assume all the honors, advantages and rights of the matrimony." It is submitted that the question is not whether the unlawful character of the connection is "unsusceptible" of change, but whether it was changed *in fact*, and why, under such circumstances, should there be a presumption that it was so changed? The same considerations do not apply, however, where the intention of the parties originally was to contract marriage, and neither of them knew of the then existing impediment.

The Pennsylvania law on the subject is contained in *Hunt's Appeal*, 86 Pa. 294 (1878). That case holds that a relation between a man and woman which was illicit at the commencement is presumed to continue so until proof of change, and a marriage therefore will not be presumed from cohabitation and reputation, where the relation between the parties was of an illicit origin, in the absence of proof of a subsequent actual marriage. It is to be noted, however, that, under the facts of that case, the man *knew* that his wife was still living when he began cohabiting with the other woman.

*H. S.*

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SPECIFIC PERFORMANCE—PAROL CONTRACT—PART PERFORMANCE.—*Jorgenson* v. *Jorgenson et al.*, 84 N. W. 221 (Supreme Court of Minnesota, November 26, 1900). The action was by George O. Jorgenson against Tilda Jorgenson and others. The judgment was for plaintiff. This is an appeal from an order denying a new trial.

"In 1885 K. O. Jorgenson, now deceased, was the owner in fee of the land in question, and at that time entered into a verbal contract or agreement with plaintiff, who was his brother, to sell and convey the same to plaintiff for the consideration of $500, to be paid in annual installments thereafter. Under and in pursuance of the contract, and in reliance thereon, plaintiff entered into possession of the land and has, at all times, since retained it; that is, he has held and retained such possession as was incident and necessary to the cultivation of the land. At the time the contract was entered into the land was uncultivated and unimproved prairie land, and plaintiff has since then broken up, cultivated and improved it, raising thereon annual crops of grain. Plaintiff has paid all taxes levied and assessed against the land since the contract was made. K. O. Jorgenson died in 1899, without having conveyed the land to plaintiff, though the full purchase money had been paid to him."

The defendant, Tilda Jorgenson, his widow, was not a party to the contract, and, of course, no judgment was or could be ordered against her, but against the surviving children of the deceased.

The purchase price was paid at different times, the greater part having been paid more than six years before the entry of this action. The defendants offered the following points against a decree for specific performance: "(1) That the evidence fails to show that a contract of sale was, in fact, ever made; (2) that it fails to show a payment of the purchase price, conceding the contract to have been made, and (3) that there has been no sufficient part performance to take the case without the statute of frauds." It may also be well to mention that there were neither buildings nor fences on the land.

Little attention need be paid to the first two points. They relate wholly to matters of evidence. The court below found both that a contract had existed and that the purchase price had been paid, and the Supreme Court pronounced the evidence in the record "wholly satisfactory." Possession of the land for fifteen years would surely raise a presumption of some kind of a contract between the plaintiff and the deceased, on the part of the plaintiff—either that of lessee or purchaser.

In Minnesota there is a statute prohibiting any party to an action from giving evidence of or concerning any conversation with or admission of a deceased person, relative to any matter at issue between the parties. It has been decided there that this prohibition does not relate to evidence of the *acts* of a deceased person, although such acts may have in law the effect of admissions. The exclusion relates only to conversations or oral admissions. Now, having passed this difficulty, the case may be tried and decided just as if the alleged vendor, K. O. Jorgenson, were living.

The Supreme Court proceeds with an inquiry as to whether the evidence shows a part performance, sufficient to avoid the statute of frauds, and says: "The rule that part performance of a verbal contract for the sale of land takes it out of the operation of the statute of frauds is founded on the equitable doctrine of estoppel, and is applied in all cases where the part performance shown is of

such a nature and character that to permit the vendor to take advantage of the statute would work a fraud upon or substantial injury to the purchaser." Then, after the citation of a number of Minnesota cases bearing on the point, the court continues thus: "In the light of this principle, we have only to inquire whether the refusal of the relief prayed for in this case would result in injustice or substantial *injury* and *loss* to the plaintiff. That it would there could be no serious doubt. No doubt the use of the land during these years more than compensated plaintiff for all improvements made thereon. But if the contract be not enforced he will be damaged and substantially prejudiced to the extent of the purchase price, paid by him more than six years ago, and also to the extent of the taxes, paid by him prior to that time. He cannot recover such payments at this time by reason of the statute of limitations, and unless the contract be performed such payments will be a total loss to him, and an unjust gain to the vendor, or at least to his estate. His loss will be a very substantial one, and the heirs should not be heard to urge in defence that the contract was within the statute of frauds and unenforceable." The order decreeing specific performance was affirmed.

Under the laws of Minnesota and all the facts of the case the *decision* was undoubtedly correct, and in accordance with the weight of authority. However, it may be suggested that the reason given for the decision is not above criticism. Practically speaking, the important thing is *the* decision, and yet the reasons assigned, if incorrect, may in the future lead not only to incorrect reasons, but also to incorrect decisions. The court, doubtless, did not mean to decide that specific performance would be granted because the statute of limitations would bar the recovery of the money paid by the vendee to the vendor, or simply because the refusal would result "in injustice or substantial injury to the plaintiff." The weight of authority seems to be against this bald proposition. As an example and authority in jurisdictions in which the English statute of frauds is in force, take the noted case of *Maddison* v. *Alderson*, L. R., 8 App. Cases, 467, decided in the House of Lords in 1883. Here a woman had lived with Thomas Alderson from 1845 until his death in 1877. Some years prior to 1860 she became his housekeeper, and continued to act as such up to the time of his death. After his decease she brought a bill for specific performance of a contract to convey certain land to her for life, which she declared had been entered into between them in 1860, when she was thinking of leaving him to become married. The alleged conveyance was to be her pay for staying. After his death a will was found, written in 1872 and executed in 1874, but it was void because it was not properly attested. In this will the testator devised to the complainant the land which she claimed by virtue of the oral agreement. The judges said it was a case of great hardship, since the statute of limitations barred any recovery for the faithful services she had rendered the decedent. Notwithstanding this irreparable injury to the complainant, specific performance was refused.

Now, the statute of frauds in force in Minnesota is practically

the English statute; but there are two reservations or exceptions in their statutes. They are sections 4214 and 4216, Wenzell's General Statutes of Minn. (1894). The first is: "The preceding section (statute of frauds) shall not be construed to prevent any trust from arising or being extinguished by implication or operation of law." The second is: "Nothing, in this chapter contained, shall be construed to abridge the power of courts of equity to compel the specific performance of agreements, in cases of part performance of such agreements."

Having passed the difficulty in regard to the evidence, and found that there had been fifteen years of *possession* under the vendor, now deceased, and that the plaintiff had *paid* the money, there was a resulting trust on the part of the vendor who still held the legal title in trust for the vendee, his agreement having been entirely performed. At this point no real difficulty could arise in enforcing specific performance. Mere lapse of time would not bar the vendee, because the statute never runs in favor of a trustee as against his *cestui que trust*, while the latter is in possession of his estate: *Love* v. *Watkins*, 40 Cal. 547 (1871); *Gilbert* v. *Sleeper*, 71 Cal. 290 (1886).

It seems that the same decision might have been arrived at, by an application of the laws of Minnesota, on the theories indicated, without a resort to the reasons assigned, which are not good in the majority of jurisdictions.

*J. B. W.*